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6  
7 **UNITED STATES DISTRICT COURT**

8 **DISTRICT OF NEVADA**

9 JOHN AND JANE DOE, individually  
and on behalf of their minor  
10 daughter MARY DOE,

11 Plaintiffs,

12 v.

13 CLARK COUNTY SCHOOL DISTRICT,  
MARY BETH SCOW, LARRY MASON,  
14 TERRI JANISON, SHIRLEY BARBER,  
SHEILA MOULTON, RUTH JOHNSON,  
15 SUSAN BRAGER-WELLMAN as the  
BOARD OF TRUSTEES for the CLARK  
COUNTY SCHOOL DISTRICT and  
16 their successors in office,  
JEFFREY HORN, as the principal  
17 of GREEN VALLEY HIGH SCHOOL,  
and their successors in office  
18 and DOES I-XX, inclusive,

19 Defendants.

CASE NO. 2:06-CV-1074-JCM(RJJ)

**ORDER**

(Granting Defendants' Renewed  
Motion for Summary Judgment,  
#64)

HEARING DATE: 8-27-08  
HEARING TIME: 10:00 A.M.

20  
21 Plaintiffs JOHN AND JANE DOE, individually and on behalf of  
22 their minor daughter MARY DOE, filed this action in the United  
23 States District Court, District of Nevada on August 31, 2006  
24 (Complaint #1). Plaintiffs contend that the alleged actions of  
25 Defendants, i.e., barring Mary Doe, a preoperative male-to-female  
26 transgendered student from using the communal ladies' room,  
27 violates Defendants' obligations pursuant to 20 U.S.C., §1681, 42  
28 U.S.C. §1983, and the Fourteenth Amendment to the U.S.

1 Constitution. Currently before the Court is Defendants' Renewed  
2 Motion For Summary Judgment (#64), filed June 6, 2008. The Court  
3 also considered Plaintiffs' Opposition (#65), filed June 6, 2008,  
4 and Defendants' Reply (#67), filed June 25, 2008. For the  
5 reasons set forth below, Defendants' motion is GRANTED.

#### 6 DISCUSSION

##### 7 1. Summary Judgment Standard

8 Summary Judgment is appropriate when "the pleadings,  
9 depositions, answers to interrogatories, and admissions on file,  
10 together with the affidavits, if any, show that there is no  
11 genuine issue as to any material facts and that the moving party  
12 is entitled to judgment as a matter of law." Fed. R. Civ. P.  
13 56(c).

14 The moving party bears the initial burden of demonstrating  
15 the absence of a genuine issue of material fact. See Celotex  
16 Corp. v Catrett, 477 U.S. 317, at 323 (1986). When the non-  
17 moving party bears the burden of proving the claim or defense,  
18 the moving party can meet its burden by pointing out the absence  
19 of evidence submitted by the non-moving party. The moving party  
20 need not disprove the other party's case. Celotex, Id., at 325.

21 If the moving party meets its initial burden, the "adverse  
22 party may not rest upon mere allegations or denials of the  
23 adverse party's pleadings, but the adverse party's response, by  
24 affidavits or as otherwise provided in this rule, must set forth  
25 specific facts showing that there is a genuine issue for trial."  
26 Fed. R. Civ. P. 56(e).

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1           **A. Plaintiffs Have Failed To Establish Standing**

2           “In every federal case, the party bringing the suit must  
3 establish standing to prosecute the action.” Elk Grove Unified  
4 Sch. Dist. v. Newdow, 524 U.S. 1 (2004). The question of  
5 standing is “whether the litigant is entitled to have the court  
6 decide the merits of the dispute or of particular issues.” Id.  
7 quoting Warth v. Seldin, 422 U.S. 490, 498 (1975).

8           As stated recently by the Supreme Court in Elk Grove Unified  
9 Sch. Dist. v. Newdow, standing jurisprudence contains two  
10 strands: “Article III standing, which enforces the Constitution’s  
11 case or controversy requirement, and prudential standing, which  
12 embodies ‘judicially self-imposed limits on the exercise of  
13 federal jurisdiction.’” Newdow, Id., citing Lujan v. Defenders  
14 of Wildlife, 504 U.S. 555, 559-62 (1992) and quoting Allen v.  
15 Wright, 468 U.S. 737, 751 (1984).

16           To satisfy Article III’s standing requirement, a plaintiff  
17 must demonstrate three elements. First, there must be an “injury  
18 in fact” which is an invasion of a “legally protected interest  
19 which is (a) concrete and particularized, and (b) actual or  
20 imminent, not conjectural or hypothetical.” Lujan, Id., at 560  
21 (citations and quotations omitted). Second, there must be a  
22 causal connection between the injury and the conduct complained  
23 of. Third, it must be likely, as opposed to merely speculative,  
24 that the injury will be “redressed by a favorable decision.”  
25 Id., at 560-61 (citations and quotations omitted). The elements  
26 of standing are an indispensable part of a plaintiff’s case, and  
27 each element must be proven. Id. at 561.

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1 Here, Plaintiffs lack standing to assert any claims for  
2 declaratory or injunctive relief since they have failed to  
3 establish an "injury in fact." Without establishing an injury in  
4 fact, Plaintiffs cannot possibly establish that their alleged  
5 injury will be redressed by a favorable decision. The undisputed  
6 evidence establishes that Plaintiffs never actually enrolled Mary  
7 Doe at Green Valley High School (GVHS), or any other CCSD high  
8 school during the past two school years (2006-2007 and/or 2007-  
9 2008). In fact, during the past two school years, Mary Doe  
10 attended Odyssey Charter High School, a school outside of the  
11 CCSD. See Def's Exhibit 1, p. 43, lines 9-11; p. 58, lines 10-24  
12 and Def's Exhibit 8, p. 29, lines 7-9. Moreover, no one employed  
13 by the CCSD ever told Plaintiffs that Mary Doe could not enroll  
14 at GVHS, or any other CCSD high school, nor were Plaintiffs under  
15 the impression that Mary Doe could not enroll in any CCSD high  
16 school. Def's Exhibit 1, p. 58, line 25; and p. 59, lines 1-18.

17 Although the evidence established that Mary Doe would not  
18 enroll at GVHS or any other CCSD high school prior to the time  
19 she would graduate, See Def's Exhibit 1, p. 50, lines 16-25; and  
20 p. 53, lines 1-2; See also, Def's Exhibit 8, p. 31, lines 9-25;  
21 p. 32, lines 1-20; and p. 57, lines 15-17, Plaintiffs' counsel  
22 represented during oral argument that Mary Doe had in fact  
23 enrolled in a CCSD high school at the commencement of the current  
24 school year (2008-2009). This additional information does not  
25 change the fact that Plaintiffs have failed to establish the  
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1 invasion of a legally protected interest<sup>1</sup> which is required to  
 2 establish standing.

3 Since Plaintiffs have failed to establish standing, summary  
 4 judgment is warranted.

5 **B. Plaintiffs' Section 1983 and Equal Protection Claims**  
 6 **Are Subsumed By Title IX**

7 Plaintiffs have also advanced a claim against Defendants  
 8 under 42 U.S.C. §1983. Section 1983 does not by itself create  
 9 substantive rights. Chapman v. Houston Welfare Rights Org., 441  
 10 U.S. 600, 617-18 (1979). Rather, it provides the procedural  
 11 framework for a plaintiff to bring suit for violations of federal  
 12 rights. 42 U.S.C. §1983. "Section 1983 supplies a cause of  
 13 action to a plaintiff whenever a person acting under color of law  
 14 deprives that plaintiff of any 'rights, privileges, or immunities  
 15 secured by the Constitution and laws of the United States.'"  
 16 Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749, at 756  
 17 (2d Cir. 1998) (citing 42 U.S.C. §1983). However, Section 1983  
 18 does not provide a remedy for violations of all federal statutes.  
 19 "When the remedial devices provided in a particular Act are  
 20 sufficiently comprehensive, they may suffice to demonstrate  
 21 congressional intent to preclude the remedy of suits under  
 22 Section 1983." Middlesex County Sewer Auth. v. Nat'l. Sea  
 23 Clammers Ass'n., 453 U.S. 1, 20 (1981).

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27 <sup>1</sup> As discussed in greater detail below, Defendants' Motion for Summary Judgment is also warranted  
 28 on the grounds that Plaintiffs' Section 1983 and Equal Protection Claims are Subsumed by Title IX, and  
 Plaintiffs have failed to establish a *Prima Facie* Case of Sex Discrimination Under Title IX.

1 In determining if 20 U.S.C. §1681 ("Title IX") precludes  
2 resort to Section 1983, courts consider (1) whether plaintiffs'  
3 Title IX claims are "virtually identical" to their constitutional  
4 claims, and (2) whether the remedies provided by Title IX  
5 indicate that Congress intended to preclude reliance on Section  
6 1983. Smith v. Robinson, 486 U.S. 992, 1009 (1984). While the  
7 Ninth Circuit has not decided the specific issue of whether  
8 Section 1983 claims are subsumed by Title IX, it has recognized  
9 that federal statutes may preclude a Section 1983 remedy if they  
10 are sufficiently comprehensive. See Dittman v. California, 191  
11 F.3d 1020, 1028 (9<sup>th</sup> Cir. 1999); Dept. of Educ. v. Katherine D.,  
12 727 F.2d 809, 820 (9<sup>th</sup> Cir. 1983). Moreover, the Supreme Court  
13 has determined that whenever the underlying statute, *here Title*  
14 *IX*, contains a private right of action (express or implied), such  
15 fact is deemed to be strong evidence of congressional intent to  
16 preclude parallel actions under Section 1983. See Sea Clammers,  
17 Id., at 20-21. Several years ago, the Supreme Court conducted a  
18 thorough review of the legislative history of Title IX and  
19 determined that Congress intended to create a private right of  
20 action under Title IX. See Cannon v. University of Chicago, 441  
21 U.S. 677, 694-703. This is important because in all of the cases  
22 in which the Supreme Court has found that Section 1983 is  
23 available to redress the deprivation of a federal statutory  
24 right, it has emphasized that the underlying statute did not  
25 allow for a private right of action (express or implied). See  
26 City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 121-22  
27 (2005). By contrast, whenever the underlying statute contained a  
28 private right of action (express or implied), the Court has

1 deemed that fact to be strong evidence of congressional intent to  
2 preclude parallel actions under Section 1983. Sea Clammers, Id.,  
3 at 20-21.

4 In the case at bar, Plaintiffs seek to use Section 1983 to  
5 redress alleged deprivations of both a federal statutory right  
6 (implicating Title IX) and a federal constitutional right  
7 (implicating the Equal Protection Clause). It is beyond dispute  
8 that the underlying factual allegations supporting Plaintiffs'  
9 Title IX and Section 1983 claims are "virtually identical," i.e.,  
10 Principal Horn's alleged act of barring and/or saying he would  
11 bar Mary Doe from using the ladies' restroom at GVHS.

12 Accordingly, Summary Judgment is warranted as to Plaintiffs'  
13 Section 1983 claim as such claim is subsumed by Title IX.

14 **C. Plaintiffs' Equal Protection Claim Is Also Subsumed By**  
15 **Title IX**

16 Like their Section 1983 claim, the underlying factual  
17 allegations supporting Plaintiffs' Equal Protection claim are  
18 "virtually identical" to those set forth in their Title IX claim.  
19 As such, this claim, like Plaintiffs' Section 1983 claim would be  
20 precluded. See Smith, Id., at 1013. (Where the Supreme Court  
21 determined that in addition to precluding section 1983 claims,  
22 "virtually identical" constitutional claims, i.e., equal  
23 protection claims may also be precluded).

24 **D. Plaintiffs Cannot Establish a *Prima Facie* Case of Sex**  
25 **Discrimination Under Title IX**

26 The two key elements for a cause of action under Title IX  
27 are: (1) that a person must be excluded from participation in,  
28 denied the benefits of, or be subjected to discrimination under

1 any education program; and (2) that such action was taken on the  
2 basis of the person's sex. 20 U.S.C. §1681(a). The scope of  
3 Title IX protection applies only to "educational programs" that  
4 receive direct federal financial assistance. Congress enacted  
5 Title IX with two principal objectives in mind: to avoid the use  
6 of federal resources to support discriminatory practices in  
7 education programs, and to provide individual citizens effective  
8 protection against those practices. See Cannon v. University of  
9 Chicago, 441 U.S. 677, 704 (1979).

10 In the case at bar, the evidence establishes that Mary Doe  
11 has not been excluded from participation in, denied the benefits  
12 of, or discriminated against under any education program, on the  
13 basis of sex. No one employed by the CCSD ever told Plaintiffs  
14 that Mary Doe could not enroll at GVHS, or any other CCSD high  
15 School, nor were Plaintiffs under the impression that Mary Doe  
16 could not enroll at GVHS or any other CCSD high school. Def's  
17 Exhibit 1, p. 58, line 25; and p. 59, lines 1-18. Plaintiffs, on  
18 their own accord, chose to enroll Mary Doe at Odyssey instead of  
19 GVHS (or any other CCSD high school), because they did not like  
20 Principal Horn's tentative position that the unisex nurse's  
21 restroom, as opposed to the ladies' restroom, was the best  
22 accommodation for Mary Doe.

23 Even if the Court were to determine that Principal Horn did  
24 prohibit Mary Doe from using the ladies' restroom, such  
25 prohibition would not constitute discrimination "under any  
26 education program and/or activity," based on Mary Doe's "sex,"  
27 under Title IX. In Jadness v. Pearce, 30 F.3d 1220 (9<sup>th</sup> Cir.  
28 1994), the Court determined that what constitutes a covered

1 "education program" for purposes of Title IX requires a factual  
2 determination as to whether the relevant portions of a  
3 recipient's program is educational in nature. Even applying this  
4 linguistically broad definition of what constitutes an "education  
5 program," under Title IX, it would be a stretch to conclude that  
6 a "restroom," in and of itself, is educational in nature and thus  
7 an education program.

8 Assuming arguendo that a "restroom" is an education program,  
9 Plaintiffs' Title IX claim still fails as Plaintiffs via their  
10 own deposition testimony acknowledge that the District would have  
11 given Mary Doe access to "a restroom," had she enrolled at GVHS.  
12 See Def's Exhibit 1, p. 62, lines 11-22. Also See Def's Exhibit  
13 8, p. 39, lines 18-25; and p. 40, lines 1-8. Since Mary Doe  
14 would have had access to a restroom had she actually enrolled at  
15 GVHS, Plaintiffs cannot possibly establish the first key element  
16 required for a Title IX Claim.

17 In analyzing the second element of a Title IX cause of  
18 action, i.e., "that a plaintiff is discriminated against on the  
19 basis of their sex," courts have relied on cases interpreting  
20 parallel language in Title VII. Title VII prohibits  
21 discrimination by an employer "because of [an] individual's race,  
22 color, religion, sex, or national origin." 42 U.S.C. §2000e-  
23 2(a) (2000). Although much of Title VII case law can be applied  
24 to Title IX actions, the analogy is not perfect as Title VII  
25 legal precedent arises exclusively out of the employment context,  
26 while Title IX was enacted solely to address instances of  
27 discrimination in educational programs that receive direct  
28 federal financial assistance. 20 U.S.C. §1681(a). In Price

1 Waterhouse v. Hopkins, 490 U.S. 228 (1998), the Supreme Court  
2 held that Title VII's "sex" discrimination prohibition barred not  
3 just discrimination based on the fact that Hopkins was a woman,  
4 but also discrimination based on the fact that she failed 'to act  
5 like a woman' - that is, to conform to socially-constructed  
6 gender expectations.

7       In the case at bar, the excerpts from the deposition  
8 testimony of both Mary and Jane Doe (at pp. 22-25 of Def's  
9 Motion-#64) establish that Defendants have not discriminated  
10 against Mary Doe under any education program (as that term is  
11 defined), because of her "sex," i.e., because she is a "male,"  
12 "female," and/or because she failed to act like a "male" or  
13 "female" (applying the expanded Price Waterhouse v. Hopkins  
14 definition).

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1 Accordingly, Plaintiffs' Title IX claim must fail.

2 **2. Conclusion**

3 For the above-stated reasons, Defendants' Motion for Summary  
4 Judgment is Granted.

5 IT IS SO ORDERED:

6   
7 UNITED STATES DISTRICT JUDGE

8 DATED: September 17, 2008  
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10  
11 Submitted by:

12 CLARK COUNTY SCHOOL DISTRICT  
13 OFFICE OF THE GENERAL COUNSEL

14 By: \_\_\_\_\_ /s/  
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